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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LEADING PUBLIC RESEARCH UNIVERSITIES THE UNIVERSITY OF DELAWARE, INDIANA UNIVERSITY, THE UNIVERSITY OF KANSAS, THE UNIVERSITY OF MINNESOTA, THE UNIVERSITY OF NEBRASKA-LINCOLN, THE PENNSYLVANIA STATE UNIVERSITY, PURDUE UNIVERSITY, AND RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. PUBLIC UNIVERSITIES HAVE RELIED ON THIS COURT'S DECISIONS TO FOSTER STUDENT BODY DIVERSITY	8
A. The Court Should Not Depart from the Framework Set Forth in *Bakke* and *Grutter*	9
B. *Amici* Have Made The Judgment That Student Body Diversity is Essential to Their Educational Goals, in Reliance on This Court's Decisions	11
II. PUBLIC UNIVERSITIES HAVE TAKEN CARE TO ENSURE THE CONSISTENCY OF THEIR ADMISSIONS PROCEDURES WITH THIS COURT'S PRECEDENTS	17
A. Core Issues of Academic Freedom are Implicated in Tailoring Admissions Policies At Public Universities	18
B. Public Universities Have Sought to Apply the Narrow Tailoring Principles Set Forth in This Court's Decisions	22

TABLE OF CONTENTS
(Continued)

Page

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

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BRIEF OF LEADING PUBLIC RESEARCH UNIVERSITIES THE UNIVERSITY OF DELAWARE, INDIANA UNIVERSITY, THE UNIVERSITY OF KANSAS, THE UNIVERSITY OF MINNESOTA, THE UNIVERSITY OF NEBRASKA-LINCOLN, THE PENNSYLVANIA STATE UNIVERSITY, PURDUE UNIVERSITY, AND RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief is submitted in support of respondents, on behalf of the various public research universities, listed below.[1]

INTEREST OF *AMICI CURIAE*

Amici are among the largest degree-granting universities in their respective states. All are research-intensive institutions with wide arrays of undergraduate, graduate and professional programs. All operate selective admission programs, meaning that the number of applicants exceeds, often substantially, the number of available seats in entering classes of matriculants. And though the extent of amici's consideration of race in their admissions processes varies from institution to institution (and across degree programs within institutions), amici are unanimous in their commitment to securing the educational benefits of a diverse student body to ful-

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties providing blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court.

fill the missions of their institutions and the needs of the communities they serve.

The University of Delaware is a research-intensive, technologically advanced institution with a tradition of excellence extending back to its founding in 1743. It offers 137 bachelor's programs, 117 master's programs, 50 doctoral programs, and 12 dual graduate programs through its 7 colleges and in collaboration with more than 60 research centers. At present, the University's student body includes nearly 17,000 undergraduates, 3,700 graduate students, and 850 students in professional and continuing studies programs.

Indiana University, a body politic of the State of Indiana, is a major multi-campus public research institution, grounded in the liberal arts and sciences, and a world leader in professional, medical, and technological education. Founded in 1820, it enrolls more than 100,000 students across 8 campuses and boasts more than 555,000 living alumni, nearly 272,000 of whom are Indiana residents.

The mission of the University of Kansas is to lift students and society by educating leaders, building healthy communities, and making discoveries that change the world. Established in 1865, it is Kansas's flagship university and a member of the prestigious Association of American Universities, an organization of 61 leading research universities in the United States and Canada. The University of Kansas's five campuses are home to more than 28,000 students studying in more than 345 degree programs.

The University of Minnesota is Minnesota's land grant university and a top public research university, serving the mission of research and discovery, teaching and learning, and outreach and public service. Founded in 1851—prior to the establishment of the state of Minnesota—the University of Minnesota was created to provide the Territory's inhabitants with the means of acquiring a thorough knowledge of the various branches of literature, science and the arts. Today, the University of Minnesota's flagship Twin Cities campus offers more than 140 majors to its 32,000-plus undergraduate students, and more than 200 graduate and professional degree programs to its nearly 17,000 graduate and professional students. University of Minnesota alumni have served important roles in government, business, medicine, the arts, and other areas, and include two U.S. vice presidents, 55 members of Congress, 19 governors for 6 states, and the founders, presidents or CEOs of thousands of companies, including Fortune 500 companies.

The University of Nebraska–Lincoln was chartered in 1869 as a land-grant university and today is an educational institution of international stature. It is one of the nation's preeminent teaching and research institutions with a wide array of sponsored projects aimed at broadening knowledge in the sciences and humanities. Through its three primary missions of teaching, research, and service, the University of Nebraska–Lincoln is Nebraska's primary intellectual center and economic development engine providing leadership throughout Nebraska and the

world through quality education and the generation of new knowledge.

The Pennsylvania State University, founded in 1855 as an agricultural college, is now a top-tier public research university that educates students from Pennsylvania, the Nation, and the world. The University improves the well-being and health of individuals and communities through integrated programs of teaching, research, and service. As Pennsylvania's land-grant university, it also provides unparalleled access and public service to support the citizens of the Commonwealth, and engages in collaborative activities with industrial, educational, and agricultural partners here and abroad to generate, disseminate, integrate, and apply knowledge that is valuable to society.

Founded in 1869 as the state of Indiana's land-grant university, Purdue University is a major research institution known for discoveries in science, technology, engineering, and math, among other areas. Consistent with its land-grant mission, Purdue seeks to set a national standard for prioritizing student affordability and accessibility. It enrolls more than 70,000 students in 10 colleges and schools located across 5 campuses and 9 polytechnic institute locations. Purdue is particularly well known for its aviation program, which includes studies in advanced spaceflight, and has produced 22 astronauts, including Neil Armstrong, the first man to set foot on the moon, and Eugene Cernan, the last man to leave it.

Rutgers, the State University of New Jersey, is a leading national research university and the state of

New Jersey's preeminent, comprehensive public institution of higher education. Established in 1766 and celebrating a milestone 250th anniversary in 2016, the university is the eighth oldest higher education institution in the United States. Rutgers' standing as a leading university reached new heights in 2013 when a state legislative act transferred to Rutgers much of the former University of Medicine and Dentistry of New Jersey, creating Rutgers Biomedical and Health Sciences and dramatically expanding Rutgers' mission to include academic medicine and wide-ranging patient care, including more than 1.7 million patient visits annually. Rutgers is a member of the Committee on Institutional Cooperation, a consortium of 15 leading universities, and the Association of American Universities. More than 67,000 students and 22,000 faculty and staff learn, work, and serve the public at Rutgers locations across the New Jersey and around the world.

Like respondent, amici strive to educate a diverse population of students from communities that are themselves increasingly diverse. As such, amici have a keen interest in this Court's resolution of this case. And as they did in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*"), amici submit this brief to highlight the experiences of leading public research universities. *See Amicus* Brief for Leading Public Research Universities in *Fisher I* (Aug. 13, 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

Public universities form the core of the American postsecondary educational system, educating mil-

lions of the best and brightest from all walks of life. Indeed, nearly three in every four students pursuing a higher education degree is enrolled in a public institution.[2] The Nation's progress in building a racially diverse cadre of leaders, professionals, and innovators reflects, in large measure, the commitment of these public universities to enrolling diverse student bodies.

A decision by this Court finding the University of Texas's race-conscious admissions program unconstitutional could significantly hamper public universities' (including amici's) ability to build on that progress. Admitting diverse student bodies that have a strong connection to the communities amici serve remains essential to achieving their dual objectives of promoting academic excellence and fostering leadership potential in students. Research shows that student-body diversity, inclusively defined, benefits *all* of amici's students as well as the broader social and professional communities those students will join after graduation. For these and other reasons, amici all share a commitment to inclusiveness and public service as part of their various missions.

Public universities have relied on the framework first set out in *Bakke*, clarified in *Grutter*, and taken as given in *Fisher I*, in their efforts to increase student body diversity. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *Grutter v.*

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[2] *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Digest of Educational Statistics: 2013 Table 303.10* (May 2015), http://nces.ed.gov/programs/digest/d13/tables/dt13_303.10.asp?referrer=report.

Bollinger, 539 U.S. 306 (2003). Petitioner has twice declined to challenge the central tenet of these decisions that universities can have a compelling interest in the educational benefits of student body diversity, and for good reason: as amici's own experience confirms, the factual and legal underpinnings of the Court's conclusion that diversity is a compelling interest remain sound.

The judgment that amici and public universities more broadly have made to pursue racially diverse student bodies is also grounded in the First Amendment and the academic freedom that universities have in choosing how to implement their educational missions—which may vary from institution to institution, or state to state. This Court has correctly recognized that the decision about whom to admit implicates that freedom, and that the judgment of colleges and universities in that regard is owed deference.

Having made the permissible threshold determination that greater student body diversity furthers their educational goals, public universities have endeavored to carefully craft their admissions policies to serve that goal. Although amici's own policies are not before the Court, their experiences are outlined to illustrate the ways in which many public universities seek to apply the guidance provided by this Court on narrow tailoring over the last four decades. Eschewing a one-size-fits-all approach, amici have developed admissions criteria and other programs designed to increase diversity that are unique to each university, and crafted to address the specific situations on their respective campuses and in their

respective states. Their experiences underscore the need for continued flexibility for universities seeking to design policies that foster diversity, consistent with the framework outlined in *Bakke* and *Grutter*.

ARGUMENT

I. PUBLIC UNIVERSITIES HAVE RELIED ON THIS COURT'S DECISIONS TO FOSTER STUDENT BODY DIVERSITY

For nearly four decades, amici and many other public universities have relied on the equal protection framework established by this Court in *Bakke*, reiterated in *Grutter*, and reaffirmed in *Fisher I*, to design and implement admission policies that foster student diversity and that are tailored to the academic programs they offer, the students they teach, and the broader populations they serve. A change now would depart from fundamental principles of *stare decisis* and "add inequity to the cost of repudiation." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992); *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Moreover, petitioner has not challenged *Grutter*'s constitutional holding or its recognition that the educational benefits of diversity constitute a compelling interest. In *Fisher I*, this Court observed that "the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding." *Fisher I*, 133 S. Ct. at 2419. That remains true here. *See* Brief of Respondent at 39-40. And as outlined below, the experiences of *amici* affirm the continued importance to

the mission and educational goals of public universities of admitting a diverse student body.

A. The Court Should Not Depart from the Framework Set Forth in *Bakke* and *Grutter*

Application of *stare decisis* "is the 'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, *fosters reliance on judicial decisions*, and contributes to the actual and perceived integrity of the judicial process.'" *Kimble v. Marvel Entm't, LLC*, 576 U.S. __, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne*, 501 U.S. at 827-28) (emphasis added). Of special relevance here, "individual or societal reliance on [past precedent] cautions with particular strength against reversing course." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing *Casey*, 505 U.S. at 855-56).

Before *Grutter*, "[p]ublic and private universities across the Nation [] modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies" expressed in *Bakke*. *Grutter*, 539 U.S. at 323. And in the decade following *Grutter*, universities have considered race in their admissions policies "more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 334. The Court took "those cases as given" in *Fisher I*. *Fisher I*, 133 S. Ct. at 2417; *see id.* at 2419 (noting that the parties did "not ask the Court to revisit" *Grutter*'s holding on the compelling interest in diversity).

Public universities have also taken these precedents as given for purposes of molding their own ac-

tions. Amici and other public universities have increased staff, developed new programs, and adjusted policies and procedures to comply with this Court's instructions. Some have gone so far as to expressly incorporate this Court's rulings into their own strategic planning, using *Bakke* and *Grutter* as guideposts for charting their future course. *See, e.g.*, Indiana Univ. Strategic Plan at 4;[3] Penn. State 2010-2015 Framework at 2-3.[4]

As the University of Delaware's General Counsel summarized, "the Supreme Court laid down ground rules that are today widely understood, legally coherent, and relatively simple to apply."[5] Nothing has changed since *Grutter* and *Fisher I*—legally or factually—to justify a sudden and abrupt departure from that precedent.

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[3] Office of Academic Support & Diversity, Univ. of Indiana, Strategic Plan, *Achieving the Vision: A Planning Document* 4 (July 2005), *available at* http://www.indiana.edu/~dema/pdfs/publications/Achieving_the_Vision2005.pdf ("Indiana Univ. Strategic Plan").

[4] Office of Vice Provost for Educ. Equity, Penn. State Univ., *A Framework to Foster Diversity at Penn State 2010-2015* 2 (2015), *available at* http://equity.psu.edu/diversity-strategic-planning/docs/framework_2010_15.pdf ("Penn. State 2010-2015 Framework").

[5] Larry White, Office of Gen. Counsel, Univ. of Delaware, *Fisher v. University of Texas at Austin: A Moment of Uncertainty in the Evolution of Affirmative Action* (October 3, 2012), http://www.udel.edu/generalcounsel/announcement.html.

B. *Amici* Have Made The Judgment That Student Body Diversity is Essential to Their Educational Goals, in Reliance on This Court's Decisions

As public institutions, amici are charged with providing the thousands of students they matriculate each year with the skills necessary for individual success in an increasingly globalized world. *See, e.g.*, Restatement of the Charter of the University of Delaware ¶ 5102 ("The leading object of the University shall be to promote the ... practical education of persons of all classes in the several pursuits and professions in life.");[6] Corporate Charter of the Pennsylvania State University at C-1 (establishing university as "an institution for the education of youth in the various branches of science, learning and practical agriculture, as they are connected with each other")[7]; Univ. of Minnesota, Mission ("The University's mission [includes]: ... shar[ing] [] knowledge, understanding, and creativity by providing a broad range of educational programs in a strong and diverse community of learners and teachers, and prepar[ing] ... students interested in continuing education and

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[6] Univ. of Delaware, *Restatement of the Charter of the University of Delaware* ¶ 5102 (1989), *available at* http://facultyhandbook.udel.edu/udcharter.

[7] Penn. State Univ., *Corporate Charter of the Pennsylvania State University* C-1 (Nov. 2014), *available at* http://www.psu.edu/trustees/pdf/Charter%20November%202014.pdf.

lifelong learning, for active roles in a multiracial and multicultural world.").[8]

Amici believe student body diversity is essential to this goal. As this Court has acknowledged, "a diverse student body ... serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher I*, 133 S. Ct. at 2418; *see also Grutter*, 539 U.S. at 330 ("classroom discussion is livelier, more spirited, and simply more enlightening ... when the students have the greatest possible variety of backgrounds") (alterations and internal quotations omitted). And "numerous studies show that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce." *Id.* (internal quotations omitted); *see also* Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 Am. Educ. Res. J. 322, 343-44 (2009) (explaining that "being in an environment where students are more engaged with diversity ha[s] significant positive educational effects" that extend to "all students," including improving "student[s'] general academic skills."); Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. of Educ. Res. 4, 21-22 (2010) (explaining that "[c]ollege diversity experiences are associated with gains in

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[8] Univ. of Minnesota, *Bd. of Regents Policy: Mission Statement* (Feb. 8, 2008), *available at* http://regents.umn.edu/sites/regents.umn.edu/files/policies/Mission_Statement.pdf.

cognitive skills," including "critical thinking and problem solving").

Student body diversity also plays a critical part in the role public universities play in molding tomorrow's leaders in their respective states. As Justice O'Connor explained in *Grutter*, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 331-32. *See also* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1799-800 (2004) (discussing how a "[f]ailure to educate a leadership class among disadvantaged minority populations" would not only harm those students, but could threaten equality and social stability in the communities these universities serve).

At least one state has passed a law recognizing the compelling societal interest in diversity in higher education. *See* Neb. Rev. Stat. § 85-9, 178 ("The Legislature [] finds that the State of Nebraska has a compelling interest in attaining greater diversity in the makeup of the student bodies at the University of Nebraska ... because of the educational benefits that a diverse educational environment will produce for all students.").

More fundamentally, this understanding is reflected in many public universities' mission statements and admission policies. *See, e.g.*, Penn. State 2010-2015 Framework at 17 (explaining that the university "must build understanding, experience, and fluency in cross-cultural competencies needed to

thrive as leaders in the multicultural contexts of today's world");[9] Indiana Univ. Academic Initiatives ("At the core of IU Bloomington's educational mission is a commitment to developing leaders. The university aims to further the causes of democracy and justice by opening pathways to leadership for members of traditionally underrepresented minority groups. Developing a vibrantly diverse campus not only creates opportunities for members to advocate for their own communities, but is also critical for multicultural understanding and collaboration in a deeply interconnected world.");[10] Purdue Univ., Toward a Mosaic for Educational Equity: A Purdue Vision and Action Plan (noting, in explaining the importance of a "diverse yet cohesive academic environment" that "[t]oday's learners, scholars, and practitioners are tomorrow's ... leaders");[11] Univ. of Delaware, Mission & Vision ("University faculty are committed to the ... cultural ... development of students as citizens, scholars, and professionals. University graduates are prepared to contribute to a global society that requires leaders with creativity,

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[9] Penn. State 2010-2015 Framework, *supra* note 4, at 17.

[10] Office of Provost & Exec. Vice President, Indiana Univ., *Academic & Initiatives: Minority Recruitment & Retention*, http://provost.indiana.edu/academic-initiatives/minority-recruitment.shtml (last visited Oct. 28, 2015) ("Indiana Univ. Academic Initiatives").

[11] Office of Provost, Purdue Univ., *Toward a Mosaic for Educational Equity: A Purdue Vision and Action Plan*, *available at* http://www.purdue.edu/provost/documents/mosaicplan.pdf (last visited Oct. 28, 2015).

integrity, and a dedication to service.");[12] Univ. of Minnesota, Equity, Diversity, Equal Opportunity and Affirmative Action Policy (recognizing that "[e]qual educational access is critical to preparing students for the responsibilities of citizenship and civil leadership in a heterogeneous society).[13]

While amici all share these goals of increased diversity, their specific objectives are not necessarily identical. Based on the unique situations on their campuses and in the communities they serve, public universities face a variety of individualized challenges to promoting diversity and in turn have a variety of diversity-related interests.

Some universities are located in relatively homogenous geographic areas and seek to increase diversity to expose their students to a more diverse community. For example, the Bloomington campus of "Indiana University has always faced significant obstacles to diversity, particularly at the undergraduate level. It has not had a large population of citizens of color in its area of the state, and th[at] region has not had a reputation for being especially friendly to people of color."[14]

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[12] Office of Inst. Research Facts & Figures, Univ. of Delaware, *Mission & Vision* (Mar. 2013), https://www.udel.edu/IR/fnf/initiatives.html.

[13] Univ. of Minnesota, *Bd. of Regents Policy: Equity, Diversity, Equal Opportunity, & Affirmative Action* 1 (July 9, 2009), *available at* http://regents.umn.edu/sites/regents.umn.edu/files/policies/Equity_Diversity_EO_AA.pdf.

[14] Indiana Univ. Strategic Plan, *supra* note 3, at 4-5.

Other universities are located in diverse geographic areas and seek to increase diversity so that the students they train in particular fields better reflect the diversity of the communities they call home. For example, the University of Delaware, which has a strong education program dedicated to training teachers, has observed a demographic gap between the teacher candidates it prepares and the public school students they serve. It has responded by investing "in generating diverse teacher education programs [that] will not only benefit its teacher candidates by creating strong teachers, but will also positively benefit the underrepresented groups served in the public schools by this pool of strong teachers."[15]

Similarly, two degree programs within a particular institution could have different diversity-related objectives. For example, a public policy degree program may seek to pursue racial and ethnic diversity to enrich class-room discussion on a range of issues that these future leaders may someday confront,[16] while a health care program may seek diverse stu-

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[15] Ctr. for Study of Diversity, Univ. of Delaware, *2013-2014 Annual Report* 12-13 ("Univ. of Delaware 2013-2014 Annual Report"), *available at* http://www.udel.edu/csd/downloads/2013-2014-annual-report.pdf (last visited Oct. 28, 2015).

[16] Humphrey School of Pub. Affairs, Univ. of Minnesota, *Master of Public Policy* (2015), https://www.hhh.umn.edu/masters-degrees/master-public-policy (describing "core" of University of Minnesota's master of public policy program as "[p]reparing future leaders to advance the common good in a diverse world" by "equip[ping] students to design, manage, and advocate for better policy solutions").

dents from within the state to pursue its interest in educating health care professionals in particular underserved communities.[17] To pursue these goals, both programs will have to balance a range of complex judgments and unique institutional factors in their pursuit of racial and ethnic diversity—from academic selectivity goals to financial concerns to the pursuit of other forms of student diversity

The materials cited here explain in far greater detail amici's numerous interests in promoting diversity. Like many public universities, amici expressly relied upon this Court's conclusion that "a university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'" *Fisher I*, 133 S. Ct. at 2419, quoting *Grutter*, 539 U.S. at 328.

Any change in this framework would undermine significant efforts that amici and other public universities have made to identify and pursue their interests in greater diversity.

II. PUBLIC UNIVERSITIES HAVE TAKEN CARE TO ENSURE THE CONSISTENCY OF THEIR ADMISSIONS PROCEDURES WITH THIS COURT'S PRECEDENTS

Leading public universities consider a number of factors when creating diverse scholarly communities

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[17] Univ. of Delaware, *Nursing Workforce Diversity*, UDaily (Nov. 18, 2014), http://www.udel.edu/udaily/2015/nov/nursing-diversity-111814.html (describing program to "increase recruitment and retention of underrepresented minorities in nursing" so as to help better serve medically underserved populations).

to meet the current and future needs of their very diverse States and of our increasingly diverse Nation. Such holistic and individualized admissions determinations permit a university to consider all aspects of a candidate, while preserving the university's academic freedom to assemble a student body that helps the university achieve its mission. Such a result is permissible under *Grutter*, and it preserves each university's long-standing freedom to decide who will teach, what will be taught, how it will be taught, and who will be admitted to study.

In applying these factors, public universities (including amici) have sought to design programs that continue to heed this Court's instruction about proper tailoring of their admissions programs. While amici's own admissions programs differ from institution to institution (and sometimes even within the institution, as between undergraduate and graduate programs, for example), amici describe some of their experiences below in designing holistic programs that "remain flexible enough to ensure that each applicant is evaluated as an individual," *Grutter*, 539 U.S. at 337, that consider race-neutral alternatives, *id.* at 339-40, and that are reviewed periodically for effectiveness, *id.* at 342-43.

A. Core Issues of Academic Freedom are Implicated in Tailoring Admissions Policies At Public Universities

A university's judgment about which students will best further the university's mission is entitled to deference by the courts. This is not simply because universities have greater institutional expertise in making such decisions—although universities

do have long and deep experience in matching students with their educational missions. Rather, this deference derives from the constitutional principle of academic freedom. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312. This freedom includes a university's exercise of its own judgment as to whom to admit into its student body. *Id.; see also Fisher I*, 133 S. Ct. at 2418.

This Court has repeatedly recognized that the academic freedom of universities is a "transcendent value" to which "[o]ur nation is deeply committed." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Academic freedom "thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also ... on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (internal citations and quotations omitted). "Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university." *Id.* (internal citations and quotations omitted); *Bakke*, 438 U.S. at 312 (Powell, J.) (same); *see also* William A. Kaplin & Barbara A. Lee, *The Law Of Higher Education* § 2.2.5 (5th ed. 2013) (discussing "judicial (academic) deference"); Robert M. O'Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275, 283-87 (1984) (discussing doctrinal evolution of academic deference).

To achieve their academic missions, universities exercise considerable academic judgment—

consistent with the holistic and individualized requirements that *Grutter* requires—to select student bodies that will further their goals. *See Bakke*, 438 U.S. at 313 (the "right to select those students who will contribute the most to the 'robust exchange of ideas'" is necessary to "achieve a goal that is of paramount importance in the fulfillment of [the university's] mission").

While all amici seek to educate and create future leaders (*see supra*, at 13), the individual missions of each public university differ and reflect the institution's (and its State's) traditions, cultures, and values. This fact is self-evident to anyone who visits the campuses, attends lectures, and interacts with the students, faculty, and alumni of the numerous public research universities throughout the Nation. Indeed, even particular colleges or programs within a large public research university can have specific missions. *See supra*, at 16-17. Universities need the ability to select the individuals that will best fit their particular missions and goals. *Ewing*, 474 U.S. at 226 (courts should be "reluctan[t] to trench on the prerogatives of state and local educational institutions").

Within the strictures of *Grutter*, amici should be permitted to exercise their well-established constitutional rights under the First Amendment by choosing the students they will educate. Such individualized decisions are not readily susceptible to judicial oversight and intervention. As the Court has recognized, there are a number of "complex educational judgments" that "lie[] primarily within the expertise of the university" to which the Court will defer

"within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328; *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 686 (2010) (recognizing the "on-the-ground expertise and experience of school administrators" in higher education). Courts thus should be "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Ewing*, 474 U.S. at 226.

Nor is this result inconsistent with the Court's equal protection jurisprudence. The First Amendment issues at stake here differentiate equal protection cases involving core areas of academic freedom—such as whom to teach—from equal protection cases in other contexts. As this Court explained in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327

To be sure, deference to universities cannot be absolute. *Gratz* explained that academic freedom can be limited where the university fails to exercise sufficient educational judgment in its admissions policies. *Gratz v. Bollinger*, 539 U.S. 244, 270-71 (2003). In *Gratz*, rather than conducting a holistic and individualized admissions process, the admissions policy at issue automatically gave twenty points to every "underrepresented minority applicant." *Id.* at 270.

But that is not the case here. *See* Brief of Respondent at 9-11. Where a university faithfully has applied *Grutter's* endorsement of a holistic and individualized consideration of race as one of many factors, admissions decisions fit squarely within the "business of a university" to decide "who may be ad-

mitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment).

B. Public Universities Have Sought to Apply the Narrow Tailoring Principles Set Forth in This Court's Decisions

Since *Grutter*, and to the extent permitted by relevant state law, many of our Nation's leading public universities consider an applicant's race as just one factor among many in a holistic and individualized evaluation of an applicant's capacity to contribute to diversity and to the academic excellence of the student body as a whole. And they have sought to do so in accordance with the guidance and principles set forth by this Court in *Bakke*, *Grutter*, and, most recently, *Fisher I*. Below, amici outline several of their own experiences—and those shared by many of their peer public institutions—in designing holistic admissions programs, in evaluating race-neutral alternatives, and in reviewing their programs for effectiveness. *Cf. Grutter*, 539 U.S. at 337, 339-40, 342-43.

1. *Many Public Universities Review Applicants on Holistic and Individualized Bases*

Many of the Nation's leading public universities seek to create a diverse campus not only along racial and ethnic lines, but across many attributes. This means that the search for a diverse student body broadly benefits the entire applicant pool, even those who are not underrepresented minorities. Indeed, because diversity encompasses more than race, the holistic and individualized component of the University of Texas's admissions process has admitted Cau-

casian students with lower Academic Index and Personal Achievement Index scores than some underrepresented minority applicants who were denied admission. *Fisher I*, Brief of Respondents, at 15-16.

A recent study has highlighted that "holistic application review" is widely used amongst public universities. Lorelle L. Espinosa, Matthew N. Gaertner, & Gary Orfield, *Race, Class, & College Access: Achieving Diversity in a Shifting Legal Landscape* 21 (Am. Council on Educ. 2015), *available at* https://www.acenet.edu/news-room/Documents/Race-Class-and-College-Access-Achieving-Diversity-in-a-Shifting-Legal-Landscape.pdf (showing that 76% of study participants used "[h]olistic application review" as a strategy for promoting "[r]acial/[e]thic or [s]ocioeconomic [d]iversity"); *see also id.* at 23 (showing that 97% of institutions that consider race in the admissions process use holistic application review) Moreover, the study found that holistic review "is the one strategy [for promoting diversity] both widely used and widely effective when compared with other strategies employed by [survey] respondents." *Id.* at 22.

Amici also utilize highly individualized admissions processes that look to numerous factors in addition to academic achievement. For example, admissions decisions at the University of Minnesota are "based on a very careful overall assessment of each student's academic preparation and performance, as well as [] additional information."[18] The

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[18] Office of Admissions, Univ. of Minnesota, *Freshman Admissions Overview*,

"primary factors" in the assessment include high school course work, GPA and class rank, as well as ACT or SAT scores, and the "secondary factors" include "[c]ontribution to the cultural, gender, age, economic, racial, or geographic diversity of the student body," among other things.[19]

Other, non-individualized admission criteria, such as percentage plans, notably are not mandated by *Grutter*. To the contrary, *Grutter* rejected such a mandate because those alternatives can require "a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Grutter*, 539 U.S. at 340. Unlike holistic and individualized plans, percentage plans operate as broad, blunt instruments that fail to account for differences in the admissions standards and universities' applicant pools. Indeed, as this Court has recognized, such plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340. Moreover, there is little evidence that these non-individualized policies are effective in promoting diversity or that they could do so without grossly distorting academic admissions standards. *See, e.g.*, Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (The Civil Rights Project, Harvard Univ.), 2003, at 59-60; Espi-

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http://admissions.tc.umn.edu/admissioninfo/fresh_overview.html (last visited Oct. 30, 2015).

[19] *Id.*

nosa, *et al.*, *Race Class & College Access* at 23 (only 40% of 338 institutions surveyed perceived percentage plans as an effective means of promoting racial/ethnic diversity).

2. *Amici Continuously And Carefully Analyze The Effectiveness Of Their Efforts To Increase Diversity*

In *Grutter*, the Court held that "race-conscious admissions policies must be limited in time" and that "the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Grutter*, 539 U.S. at 342.

In keeping with this guidance, many leading universities analyze on a regular basis the strides they have made toward greater diversity—not for purposes of making their admissions decisions each year, but as a matter of retrospective examination of their successes (and failures) in achieving their diversity goals. For example:

- Indiana University retained an outside consultant to conduct an external diversity assessment, which "will serve as a baseline measurement for Indiana University in diversity achievement and progress which will provide information to further [its] efforts for strategic planning university wide." [20]

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[20] Office of Vice President for Diversity, Equity, & Multicultural Affairs, Indiana Univ., *Diversity Assessment for IU* (June 1, 2015), http://www.iu.edu/~dema/div_assess/index.shtml.

- The University of Delaware conducted a survey to assess student attitudes, which found that students believed that the University did not have enough diversity and was not doing enough to promote diversity.[21]
- The Pennsylvania State University adopted a plan requiring units within the University to assess the progress they have made toward their individual diversity strategic plans, in which they are required to explain the measures of success and the specific data on which they relied.[22]

In *Grutter*, the Court recognized that the benefits of enrolling a critical mass of minority students "are substantial." *Grutter*, 539 U.S. at 330. A "critical mass" is not a specific number, though it necessarily entails some examination of the facts to determine whether, for example, there are sufficient "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 319. While university demographics certainly need not mirror state demographics, wide disparities between the two suggest at least a need for greater inquiry as to whether a critical mass has been achieved. For example:

- African-American representation in the State of Delaware of 22.2% is more than four times

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[21] Univ. of Delaware 2013-2014 Annual Report, *supra* note 15, at 13.

[22] *See generally*, Penn. State 2010-2015 Framework, *supra* note 4.

higher than African-American representation at the University of Delaware of 5.1%.[23]

- Both African-American and Hispanic representation in the State of Kansas of 6.3% and 11.4% are more than fifty percent higher than their respective representation at the University of Kansas of 4.0% and 6.2%.[24]
- Hispanic representation in the State of Nebraska of 10.2% is more than double Hispanic representation at the University of Nebraska of 4.97%.[25]
- African-American representation in the State of Pennsylvania of 11.6% is more than double

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[23] *Compare* Univ. of Delaware, *UD Facts & Figures 2014-15*, *available at* https://sites.udel.edu/ire/files/2015/04/21-ugdiversity-nsws3c.pdf (last visited Oct. 28, 2015), *with* U.S. Census Bureau, *State & County QuickFacts: Delaware*, http://quickfacts.census.gov/qfd/states/10000.html (last visited Oct. 28, 2015).

[24] *Compare* Office of Inst. Research & Planning, Univ. of Kansas, *Table 4-113: Student Head Count By Race/Ethnicity (Self-Reported)* (2015), *available at* https://oirp.drupal.ku.edu/sites/oirp.drupal.ku.edu/files/files/Profiles/2016/4-113.pdf, *with* U.S. Census Bureau, *State & County QuickFacts: Kansas*, http://quickfacts.census.gov/qfd/states/20000.html (last visited Oct. 28, 2015).

[25] *Compare* Univ. of Nebraska-Lincoln, *Table 100: Total Headcount Enrollment*, http://irp.unl.edu/dmdocuments/050_fall_2015_enrl_p100.pdf (last visited Oct. 28, 2015), *with* U.S. Census Bureau, *State & County QuickFacts: Nebraska*, http://quickfacts.census.gov/qfd/states/31000.html (last visited Oct. 28, 2015).

African-American representation at the University Park campus of the Pennsylvania State University of 4.0%.[26]

3. *Amici Have Endeavored To Increase Diversity In Numerous Ways Other Than Consideration Of Race In Admissions.*

In *Fisher I*, this Court explained that:

> Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives."

Fisher I, 133 S. Ct. at 2420 (internal citations omitted).

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[26] *Compare* Univ. Budget Office, Penn. State Univ., *Enrollment By Race/Ethnicity Category As A Percent of Total Enrollment* (2015), http://www.budget.psu.edu/factbook/studentdynamic/HistoricalMinorityEnrolByEthnicityPercent.aspx?YearCode=2015&FBPlusIndc=N, *with* U.S. Census Bureau, *State & County QuickFacts: Pennsylvania*, http://quickfacts.census.gov/qfd/states/42000.html (last visited Oct. 28, 2015).

As the foregoing demographic information suggests and as public universities' internal and external studies confirm, there is still a compelling need for greater student diversity. Notably, however, these disparities persist even though public universities have considered numerous other methods to increase diversity. *Cf.* Espinosa, *et al.*, *Race Class & College Access* at iv ("Institutions that consider race in admissions decisions use ... race-neutral diversity strategies more often and find them more effective than institutions that use race-neutral strategies alone."). These methods have contributed to diversity but, as discussed above, have not been independently sufficient to achieve universities' diversity goals.

For example, public universities have expanded their outreach efforts in an attempt to increase the number of applications they obtain from minority candidates.[27] Public universities have also expanded

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[27] "Three of the five most widely used strategies to support racial, ethnic, and socioeconomic diversity involve student outreach and recruitment." Espinosa, et al., *Race Class & College Access* at iv. *See also*, Univ. of Delaware, *Nursing Workforce Diversity*, *supra* note 17 (describing award of grant to "increase recruitment ... of underrepresented minorities in nursing" and quoting program leader's statement that "Delaware provides a living laboratory within which to test innovative recruitment" programs); *but see* Univ. of Nebraska-Lincoln. *Diverse needs: Race & Ethnicity*, Graduate Mentoring Guidebook, http://www.unl.edu/mentoring/race-and-ethnicity (last visited Oct. 28, 2015) (explaining that one reason "the campus community as a whole remains relatively homogenous" is that "disciplinary programs are still learning how to expand their student recruitment and outreach efforts.").

their recruitment efforts in an attempt to increase the number of acceptances they receive from admitted minority applicants.[28]

Public universities have implemented diversity-related coursework;[29] retreats, workshops, and other conversations among students;[30] and leadership training programs.[31]

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[28] *See, e.g.*, Indiana Univ. Bloomington, *Diversity Student Recruitment Committee Report* 1 (Feb. 3, 2014) ("Ind. Univ. Comm. Rep."), *available at* http://www.indiana.edu/~dema/pdfs/publications/Diversity_Student_Recruitment_Rpt2014.pdf ("We will scale up the most successful events for admitted students, which are Family Dinners and Campus Collage (an overnight campus visit) to reach more admitted [underrepresented minority] students.").

[29] *See, e.g.*, Univ. of Delaware 2013-2014 Annual Report, *supra* note 15, at 11 (describing launch of "pilot one-credit Diversity Dialogues course"); Office of Acad. Servs., Rutgers, *Diversity & Global Awareness Requirement*, http://sasundergrad.rutgers.edu/ladr/diversity-and-global-awareness-requirement (last visited Oct. 28, 2015) (describing "Diversity and Global Awareness" requirement that can be fulfilled through coursework "enable[ing] an understanding of an increasingly globalized world"); Office of Equity & Diversity, Univ. of Minnesota, *Equity & Diversity Certificate Program*, https://diversity.umn.edu/equitydiversitycertificate (last visited Oct. 30, 2015) (describing "Equity and Diversity Certificate Program," a 30 hour curriculum to help students and staff develop tools necessary for advancing equity and diversity in all aspects of their personal and professional lives).

[30] *See, e.g.*, Indiana Univ., Notice, *2nd Annual Diversity Leadership Conference* (Nov. 1, 2014), http://www.iub.edu/~dleaders/ (describing Diversity Leadership Conference, a "student leadership event that provides a platform from which to address issues that impact various student communities" through "workshops, seminars and speakers to

According to the 2013 Diversity Officer Survey conducted by researchers at the University of Michigan and University of Connecticut, "[b]etween 2009 and 2013, more than 30 higher education institutions created administrative positions focused on diversity and inclusiveness."[32]

Public universities have also engaged in various steps to make sure diverse communities feel comfortable on campus, by expanding programs designed

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promote ... diversity education"); Office of Multicultural Affairs, Univ. of Kansas, *Colors of KU*, http://oma.ku.edu/colors-ku (last visited Oct. 28, 2015) (describing "Colors of KU," a "three-day diversity retreat designed to build leadership, organizational, and other skills, with a large focus on diversity and multiculturalism").

[31] *See, e.g.*, Univ. of Kansas, *Student Involvement and Leadership Center*, https://silc.ku.edu/ (last visited Oct. 28, 2015); Office of Student Activities, Penn State, *Leadership Programs*, http://studentaffairs.psu.edu/hub/leadership/ (last visited Oct. 28, 2015).

[32] Troy Fedderson, Univ. Commc'ns, Univ. of Nebraska-Lincoln, *Diversity Initiative Begins to Take Shape*, UNL Today, (Nov. 6, 2014), http://news.unl.edu/newsrooms/unltoday/article/diversity-initiative-begins-to-take-shape/. For example, the University of Nebraska-Lincoln has assembled a Diversity Administrative Council staffed with members from across the university who are "tasked with leading efforts to shape strategies to make campus more diverse." *Id.*

to respond to discrimination[33] and by fostering the development of diverse student organizations.[34]

Notwithstanding these varied efforts to pursue race-neutral alternatives, many public universities (including amici) have a ways to go in achieving their diversity objectives. Public universities should be permitted to continue using racial diversity as one factor among many to achieve the educational benefits of diversity, and should retain the flexibility to tailor their policies in accordance with this Court's rulings in *Bakke*, *Grutter*, and *Fisher I*.

CONCLUSION

The judgment below should be affirmed.

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[33] For example, the University of Nebraska-Lincoln recently "launched 'Tips Prevent,' a web-based system that allows individuals to report incidents and concerns related to discrimination, sexual harassment and other inappropriate conduct." *Id.*

[34] *See, e.g.*, Office of Admissions, Univ. of Nebraska-Lincoln, *Student Organizations*, http://admissions.unl.edu/student-life/diversity-community/student-organizations.aspx (last visited Oct. 28, 2015) (listing various student organizations under diversity section of admissions website).

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